

1  
2  
3 IN THE UNITED STATES DISTRICT COURT  
4

5 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
6

7 TODD LEWIS ASHKER and DANNY TROXELL,  
8

No. C 05-3286 CW

Plaintiffs,

ORDER GRANTING IN  
PART AND DENYING IN  
PART PLAINTIFFS'  
MOTION FOR  
RECONSIDERATION

v.

9 ARNOLD SCHWARZENEGGER, et al.,  
10

Defendants.

11  
12  
13 Plaintiffs Todd Ashker and Danny Troxell, prisoners of the  
14 State of California who are incarcerated in the Security Housing  
15 Unit (SHU) at Pelican Bay State Prison (PBSP), move for leave to  
16 file a motion for reconsideration (Docket # 149) of the Court's  
17 June 14, 2007 Order Granting in Part Defendants' Motion to Dismiss  
18 and Denying it in Part and Denying in Part Plaintiffs' Motion to  
19 Amend Complaint (June 14 Order) (Docket # 140). Defendants oppose  
20 the motion for reconsideration. Because Plaintiffs' motion for  
21 leave is very detailed and because Defendants have filed an  
22 opposition to it, the Court considers it a motion for  
23 reconsideration. Having considered all the papers filed by the  
24 parties, the Court GRANTS in part and DENIES in part Plaintiffs'  
25 motion for reconsideration.

26 BACKGROUND  
27

28 In their motion to dismiss, Defendants moved to dismiss the

1 first, third, fourth and fifth claims in Plaintiffs' first amended  
2 complaint (FAC): (1) violation of First Amendment freedom to  
3 associate; (3) violation of Fifth Amendment freedom against self-  
4 incrimination arising from the CDCR's debriefing requirement and  
5 Fifth and Fourteenth Amendment right to procedural and substantive  
6 due process of law; (4) violation of Eighth Amendment prohibition  
7 of cruel and unusual punishment, also arising from the debriefing  
8 requirement; and (5) (a) violation of the Ex Post Facto clause of  
9 the United States Constitution for retention in the SHU on  
10 indeterminate status based upon gang association, (b) violation of  
11 the Due Process Clause of the Fourteenth Amendment due to their SHU  
12 status and lack of access to prison programs, which prevent them  
13 from being granted parole, (c) violation of the Equal Protection  
14 Clause of the Fourteenth Amendment because of different treatment  
15 of white SHU inmates, (d) violation of procedural and substantive  
16 due process under the Fourteenth Amendment based on the deprivation  
17 of their liberty interest in being paroled, and (e) violation of  
18 their procedural and substantive due process rights by denying them  
19 release from the SHU based on their inactive status in the Aryan  
20 Brotherhood gang (AB), when no reliable evidence was presented to  
21 demonstrate their participation in illegal gang activity.

22       Primarily, Defendants argued that these claims must be  
23 dismissed because Plaintiffs had failed to exhaust their  
24 administrative remedies. The Court first undertook an extensive  
25 analysis of the evidence and argument submitted by both parties  
26 regarding whether each of Plaintiffs' appeals had been exhausted.  
27 Because Plaintiffs' administrative appeals used different language  
28

1 from the claims presented to the Court, the Court then analyzed  
2 whether the claims presented in the FAC had been sufficiently  
3 stated in those appeals that had been fully exhausted to have put  
4 Defendants on notice of the rights Plaintiffs alleged Defendants  
5 had violated. The Court concluded that four claims in the  
6 complaint had been fully exhausted: (1) Plaintiffs' second cause of  
7 action for a First Amendment violation premised on denial of access  
8 to certain magazines; (2) Plaintiffs' due process claim based on  
9 Defendants' procedure for determining whether Plaintiffs are active  
10 or inactive gang members; (3) Plaintiffs' sixth cause of action for  
11 negligence; and (4) Plaintiffs' seventh cause of action for an  
12 intentional tort.

13 Plaintiffs request reconsideration of the dismissal of the  
14 following claims: (1) claims against the Board of Prison Hearings  
15 (BPH) in the fifth cause of action; (2) claims based on self-  
16 incrimination and refusal to debrief in the third cause of action;  
17 and (3) the claim based on cruel and unusual punishment in the  
18 fourth cause of action.

## LEGAL STANDARD

20           Motions for reconsideration are not a substitute for appeal or  
21 a means of attacking some perceived error of the court. Twentieth  
22 Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir.  
23 1980). Jurisdictional defects and frivolous or meritless claims  
24 cannot be remedied by merely moving for reconsideration. United  
25 States v. Hetrick, 644 F.2d 752, 756 (9th Cir. 1980). "[T]he  
26 major grounds that justify reconsideration involve an intervening  
27 change of controlling law, the availability of new evidence, or the

1 need to correct a clear error or prevent manifest injustice.' "  
2 Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 369  
3 n.5 (9th Cir. 1989) (quoting United States v. Desert Gold Mining  
4 Co., 433 F.2d 713, 715 (9th Cir. 1970)).

5 DISCUSSION

6 I. Claims Against BPH

7 Plaintiffs brought two claims against the BPH: (1) violation  
8 of the ex post facto clause of the Constitution and (2) violation  
9 of their liberty interests in parole. In the June 14 Order, the  
10 Court found that Troxell had not exhausted his claims against the  
11 BPH but that Ashker had. The Court, citing Docken v. Chase, 393  
12 F.3d 1024, 2038 (9th Cir. 2004), dismissed Ashker's claims without  
13 prejudice to filing them in a petition for writ of habeas corpus  
14 because it appeared from his complaint that the claims sought an  
15 earlier release date. In his motion for reconsideration, Ashker,  
16 citing Wilkinson v. Dotson, 544 U.S. 74 (2005) and Osborne v.  
17 District Attorney's Office, 423 F.3d 1050 (9th Cir. 2005),  
18 clarifies that he seeks only prospective injunctive relief and that  
19 it will not necessarily affect the fact or duration of his sentence  
20 if he is successful. Defendants argue that the Court should not  
21 reconsider its ruling on this claim because, in his FAC, Ashker  
22 requests compensatory damages from each defendant in excess of  
23 \$1,000,000 as well as punitive and exemplary damages and Ashker's  
24 pleadings allege that the only reason he has not been granted a  
25 parole date is PBSP's gang validation policy and BPH's no-parole  
26 policy. Defs' Opp. at 4.

27 In Docken, the Ninth Circuit held that "when prison inmates  
28

1 seek only equitable relief in challenging aspects of their parole  
2 review that, so long as they prevail, could potentially affect the  
3 duration of their confinement, such relief is available under the  
4 federal habeas statute. Whether such relief is also available  
5 under § 1983 depends on the application of [Heck v. Humphrey's]  
6 favorable termination rule in this case, an issue not before us  
7 . . . " Docken, 393 F.3d at 1031 (citing Heck v. Humphrey, 512  
8 U.S. 477 (1994)).

9 Therefore, Docken did not warrant dismissal of Ashker's claims  
10 against the BPH based upon the grounds that they could only have  
11 been brought in a habeas petition.

12 In Heck, the inmate sought only damages, not injunctive relief  
13 or release from custody, for alleged constitutional violations  
14 committed during his arrest and confinement. Id. at 479. Heck  
15 held that a damages action is not cognizable under § 1983 if a  
16 judgment in the plaintiff's favor would imply the invalidity of the  
17 conviction or sentence unless the conviction or sentence has  
18 already been invalidated. Id. at 487.

19 However, in Wilkinson, the Supreme Court further explained its  
20 ruling in Heck. The Supreme Court explained that "§ 1983 remains  
21 available for procedural challenges where success in the action  
22 would not necessarily spell immediate or speedier release for the  
23 prisoner." Wilkinson, 544 U.S. at 82. In other words, "a state  
24 prisoner's § 1983 action is barred . . . no matter the relief  
25 sought (damages or equitable relief), no matter the target of the  
26 prisoner's suit (state conduct leading to conviction or internal  
27 prison proceedings), if success in that action would necessarily

1 demonstrate the invalidity of confinement or its duration." Id.  
2 The Court applied these principles to the two consolidated cases  
3 before it in which two inmates brought § 1983 actions claiming that  
4 the application by the parole board of the harsher parole  
5 guidelines that were enacted after the date of their convictions  
6 was unconstitutional. Id. The Court concluded that the claims  
7 were cognizable under § 1983 because the inmates only sought  
8 prospective injunctive relief seeking new parole hearings in which  
9 the parole board would apply the guidelines in effect at the time  
10 they were convicted. Id. The Court concluded that the connection  
11 between the use of the proper parole guidelines and the prisoners'  
12 release from confinement was too tenuous to require that the claim  
13 be brought only in a habeas petition. Id. at 78. The Court  
14 explained that the prisoners were not challenging the fact or  
15 duration of their confinement but were seeking a declaration that  
16 the parole proceedings were invalid and an injunction against the  
17 prospective enforcement of allegedly invalid parole guidelines.  
18 Id. at 80-82. The Court distinguished the case before it from  
19 Preiser v. Rodriguez, 411 U.S. 475, 476 (1973) in which prisoners  
20 were seeking reinstatement of good-time credits of which they  
21 allegedly been unconstitutionally deprived at a prison disciplinary  
22 proceeding. Id. at 78. The Court explained that because  
23 restoration of good-time credits would necessarily result in  
24 immediate release or a shorter period of detention, the case fell  
25 within the core of habeas corpus and could not be prosecuted in a  
26 § 1983 proceeding. Id. at 79. The Court cited Wolff v. McDonnell,  
27 418 U.S. 475 (1973), which also held that an action for restoration  
28

1 of good-time credits improperly taken in an unconstitutional  
2 proceeding must be brought in a habeas proceeding. Id. However,  
3 in Wolff, the Court noted that the inmates could use § 1983 to  
4 obtain a declaration that the disciplinary procedures were invalid  
5 as a predicate to their requested damages award, and they could  
6 also seek an injunction enjoining the prospective enforcement of  
7 invalid prison regulations. Id. (citing Wolff, 418 U.S. at 553).  
8 The Court explained that success in the two § 1983 actions in  
9 Wilkinson would not result in immediate release or a shorter period  
10 of incarceration because the prisoners attacked only the wrong  
11 procedures, not the wrong result. Id. at 80.

12 Osborne addressed a prisoner § 1983 action seeking to compel  
13 the district attorney to release certain biological evidence that  
14 was used to convict the petitioner of kidnaping and sexual assault.  
15 Osborne, 423 F.3d at 1051. The district court dismissed the § 1983  
16 action as barred by Heck because the petitioner sought to set the  
17 stage for an attack on his underlying conviction. Id. The Ninth  
18 Circuit reversed on the ground that success in obtaining the  
19 evidence would not necessarily demonstrate the invalidity of his  
20 incarceration or its duration. Id. at 1054. The court explained  
21 that because success would yield only access to the evidence and  
22 that DNA analysis of the evidence might prove exculpatory,  
23 inculpatory or inconclusive, there was a significant chance that  
24 the results would confirm or have no significant effect on the  
25 validity of the prisoner's conviction. Id.

26 Defendants rely on Butterfield v. Bail, 120 F.3d 1024 (9th  
27 Cir. 1997). In that case, the district court had dismissed a

1 prisoner's § 1983 action alleging that the defendants had violated  
2 his due process rights because they relied on false information to  
3 find him ineligible for parole. Id. at 1024. The Ninth Circuit  
4 affirmed the dismissal on the ground that "a challenge to the  
5 procedures used in the denial of parole necessarily implicates the  
6 validity of the denial of parole and, therefore, the prisoner's  
7 continuing confinement. . . . Few things implicate the validity of  
8 continued confinement more directly than the allegedly improper  
9 denial of parole. This is true whether that denial is alleged to  
10 be improper based upon procedural defects in the parole hearing or  
11 upon allegations that parole was improperly denied on the merits."  
12 Id. Furthermore, the fact that the prisoner only asked for money  
13 damages rather than an injunction did not remedy the fact that he  
14 was not challenging the length of his confinement, because his  
15 damages could only be measured by that confinement. Id. at 1025.

16 However, the Ninth Circuit did not have the benefit of the  
17 reasoning in Wilkinson when it decided Butterfield.

18 Ashker clarifies that, like the inmates in Wilkinson, he seeks  
19 only prospective injunctive relief enjoining the BPH from using  
20 allegedly unconstitutional guidelines at his next hearing. Unlike  
21 the inmates in Preiser and Wolff, he is not requesting monetary  
22 damages or that the Court take any action that would directly  
23 result in his immediate release or a shorter period of confinement.  
24 Thus, Ashker's claims do not lie at the core of habeas corpus, and  
25 they may be brought under § 1983. Therefore, the Court reconsiders  
26 its previous order relating to Ashker's claims against the BPH and  
27 DENIES Defendants' motion to dismiss them.

## 1 II. Exhaustion of Other Claims

2 The Court has reviewed Plaintiffs' arguments and declarations  
3 supporting their contention that the other claims cited in their  
4 motion for reconsideration have been exhausted. However, the Court  
5 thoroughly reviewed all the evidence and arguments submitted by the  
6 parties on this issue in ruling on Defendants' motion to dismiss.  
7 Plaintiffs fail to present any intervening change in law or new  
8 evidence that was unavailable at the time they filed their  
9 opposition to the motion to dismiss. Therefore, reconsideration of  
10 this part of the Court's June 14 Order is not warranted.

## 11 CONCLUSION

12 For the foregoing reasons, the Court GRANTS Plaintiffs' motion  
13 for reconsideration in part and DENIES it in part (Docket # 149).  
14 The June 14, 2007 Order is amended in regard to Ashker's  
15 constitutional claims against the BPH which are not dismissed. All  
16 other parts of the June 14, 2007 Order remain in effect.

17 IT IS SO ORDERED.

18  
19 Dated: 9/20/07

  
20 CLAUDIA WILKEN  
21 United States District Judge

22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

ASHKER ET AL et al,

Plaintiff,

Case Number: CV05-03286 CW

V.

SCHWARZENEGGER ET AL et al.

Defendant.

## **CERTIFICATE OF SERVICE**

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on September 20, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
in the Clerk's office.

15 Danny Troxell B-76578  
Pelican Bay State Prison  
16 P.O. Box 7500, C-8-101  
Crescent City, CA 95531

17 J. Randall Andrada  
18 Andrada & Associates  
19 180 Grand Avenue  
Suite 925  
Oakland, CA 94612

20 Todd Ashker C-58191  
21 Pelican Bay State Prison  
22 P.O. Box 7500, D1-119  
Crescent City, CA 95531

23 | Dated: September 20, 2007

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk